Supreme Court, U.S.
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No. 15-648

In the Supreme Court of the United States

V.L.,

Petitioner,

v.

E.L., AND GUARDIAN AD LITEM, AS REPRESENTATIVE OF MINOR CHILDREN,

Respondents.

On Petition for Writ of Certiorari to the Alabama Supreme Court

RESPONDENT E.L.'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A "second parent" adoption is one granted to a third party without severing the rights of the child's living parent. V.L. and E.L. were an unmarried couple living in Alabama. A Georgia court granted V.L. a second parent adoption of E.L.'s three biological children, while leaving intact E.L.'s parental rights. Georgia law, however, provides that children may be adopted by a third party "only if [the children's] living parent ... has voluntarily and in writing surrendered all of his or her rights to such child[ren]." Ga. Code Ann. § 19-8-5(a).

When the couple subsequently split up, V.L. sought to enforce the Georgia adoption in Alabama under the federal Full Faith and Credit Clause. The Alabama Supreme Court ruled that the Georgia adoption was not entitled to full faith and credit because the Georgia court lacked authority—and hence, jurisdiction—to award a second parent adoption under Georgia law.

The questions presented are:

1. Does a state court owe full faith and credit to a sister state's "second parent" adoption, when the sister state's law expressly prohibits "second parent" adoptions?

2. Does a state court owe full faith and credit to a sister state's adoption, when the undisputed evidence shows that the adoptive parent went to the sister state solely for the purpose of obtaining the adoption?

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INTRODUCTION

This case concerns a "second parent" adoption, meaning an adoption granted to a member of an unmarried couple that simultaneously preserves the rights of the biological parent. Such unusual adoptions are not authorized by the laws of most states and, in Georgia, they are expressly prohibited by statute. Nonetheless, a Georgia court granted a second parent adoption to the petitioner, who at the time was living with the respondent in Alabama. When the couple subsequently split up, the petitioner sought to enforce the Georgia adoption in Alabama under the Full Faith and Credit Clause. The Alabama Supreme Court declined, applying the settled rule that a sister state judgment does not merit full faith and credit if the issuing court lacked the power to render it. *See, e.g.*, *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (a judgment merits full faith and credit "only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment").

The petition seeks review of the Alabama Supreme Court's decision, but it fails to clear the first hurdle of certworthiness. It does not show—and does not even try to show—that the full faith and credit question actually presented by the decision implicates a split of authority among lower courts. Instead, the petition merely claims the Alabama Supreme Court was wrong. But correcting purported errors from lower courts is hardly the purpose of this Court's certiorari jurisdiction. That is all the petitioner asks the Court to do, and her petition should be denied for that reason alone.

Beyond that, there is another reason to deny the petition. If the issue is as important as the petitioner believes, then this Court would be well served to allow it to percolate further in the lower courts before settling it. To date, there has been no percolation at all—indeed, the court below appears to be the only one ever to have squarely addressed the issue. It has been a century since the last time this Court addressed how the full faith and credit obligation applies to an adoption decree. *See Hood v. McGehee*, 237 U.S. 611, 615 (1915). And the adoption here is not just *any* adoption; it is a singular kind of adoption whose legality is contested in the states and which is plainly forbidden by the law of the state whose court issued it. Before wading into these waters, the Court should allow other courts to weigh in. Given the petitioner's assurances that similar adoptions have been granted in many states, the full faith and credit issue is likely to come up in future cases. When there is an actual split of authority on the issue—something manifestly absent at present—the Court could then choose to intervene.

The final reason not to grant the petition is that the lower court's decision was correct. The Alabama Supreme Court repeatedly invoked the settled principle that full faith and credit permits re-examination of the jurisdiction, but not the merits, of a sister state judgment. Carefully applying that principle, the Alabama court determined that the Georgia court simply lacked power—and hence, jurisdiction—to award a second parent adoption. This was not, the court explained, a mere technical defect nor an issue that went to the adoption's "merits." Instead, the Georgia decree facially violated a basic condition for adoptions plainly set forth in the Georgia statute. In

short, this was not an adoption that the Georgia court *should not* have granted; it was one the Georgia court *could not* have granted under Georgia law. That is a jurisdictional defect under the Full Faith and Credit Clause. *See Fauntleroy v. Lum*, 210 U.S. 230, 234-35 (1908) (a merits issue pertains to "the duty of the court," whereas a jurisdictional issue pertains to "[the court's] power"). The Alabama Supreme Court thus correctly determined that the Georgia adoption was not entitled to recognition in Alabama.

STATEMENT

A. Factual Background

Respondent E.L., a lifelong resident of Alabama, is the biological mother of three children through artificial insemination. In December 2002 she gave birth to S.L., and, in November 2004, to twins, N.L. and H.L. At the time, E.L. was living in Hoover, Alabama with petitioner V.L, a woman with whom she had been in a relationship since 1995. V.L. acted as the children's parent along with E.L. *See generally* Pet. App. 5a; E.L. Aff. ¶ 2, Mar 11, 2014.

In 2006, V.L. and E.L. decided they wanted V.L. to adopt the children and make both women legal parents. According to V.L.'s affidavit, they began researching which jurisdictions might be "receptive" to that arrangement. Pet. App. 5a-6a. An attorney advised them that Georgia was a hospitable jurisdiction, but that V.L. "needed to be a resident of ... Georgia, specifically Fulton County, for at least six (6) months to petition for adoption[.]" *Id.* at 6a. In October 2006, V.L. and E.L. leased a house in Alpharetta, Georgia from the mother of E.L.'s college friend and subsequently

began the adoption process. According to V.L.'s affidavit, "a background check request was submitted using the Alpharetta address," and "[o]n March 26, 2007, a home study was done at the address in Georgia; per my attorney this was a requirement for petitioning for adoption." *Id.* Throughout this period, however, the couple continued to live and work in Alabama, and spent only two nights in the Georgia house, as explained in E.L.'s affidavit:

> We never moved in[to the Georgia house]. We never lived there. We spent approximately two nights there, one before the "home study." That night, we packed up the kids in the SUV along with toys, photographs, refrigerator magnets, etc. and put these things around our friend's house. We hung a bird feeder the children had made in the backyard. This was done so it would appear to the home inspector that we lived there. After the "home study" was done, we packed up and returned to our home in Hoover, Alabama. The other night we spent [in Georgia] was the night before the adoption hearing.

E.L. Aff. ¶ 5, Mar. 11, 2014; *see also* Pet. App. 6a-7a (noting E.L.'s testimony the women "never spent more than approximately two nights in [the Georgia house], instead continuing to live and work at their jobs in Alabama")

On April 10, 2007, V.L petitioned to adopt the three children in Fulton County, Georgia. Pet. App. 7a. E.L. consented to the adoption, but asserted that she did not "relinquish or surrender any parental rights to the children." Parental Consent to Adoption (Apr. 9, 2007), at 1; Pet. App. 7a. On May 30, 2007, the Georgia court

entered a final decree granting V.L.'s petition. Pet. App. 7a, 64a. The decree specified that V.L. would be recognized as the children's "second parent" but that E.L.'s parental rights as the "legal and biological mother" were "preserved intact." *Id.* at 64a. While stating generally that V.L. had "complied with all relevant and applicable formalities regarding the [adoption]," *Id.* at 63a, the court's order did not address whether Georgia law authorized granting an adoption to V.L. (who was not married to E.L.) while simultaneously leaving E.L.'s parental rights intact. Nor did the court's order address whether V.L. was a bona fide domiciliary of Georgia.

In November 2011, V.L. and E.L.'s relationship ended, and, in January 2012, V.L. moved out of the house the women had shared in Alabama. *Id.* at 7a.

B. Procedural Background

On October 31, 2013, V.L. filed a petition in a Jefferson County, Alabama circuit court alleging that E.L. was refusing her access to the children. She sought to have the Georgia adoption decree registered as a foreign judgment, to be declared a legal parent, and to be awarded custody or visitation. Pet. App. 7a-8a. The case was transferred to the Jefferson County Family Court, and E.L. moved to dismiss, *inter alia,* on the ground that the Georgia decree did not merit full faith and credit because the Georgia court lacked jurisdiction to award the adoption to V.L. *Id.* at 8a. Without holding a hearing, the family court denied E.L.'s motion to dismiss and simultaneously granted V.L. visitation rights. *Id.* E.L. timely appealed to the Alabama Court of Civil Appeals.

Initially, the appeals court agreed with E.L. that the Georgia court lacked jurisdiction to award an adoption to a non-spouse without first terminating the rights of the current parent, and that the Georgia decree was consequently not entitled to full faith and credit. *E.L. v. V.L.*, No. 2130683, slip op. at 9-13 (Ala. Civ. App. Oct. 24, 2014).[1] The court reversed itself on rehearing, however. Pet. App. 45a. It decided that any defect in the Georgia adoption went to the merits and not to jurisdiction, and that the adoption therefore merited full faith and credit. *Id.* at 52a-57a, 59a-60a. However, the court reversed the family court's award of visitation to V.L. The court explained that, before visitation could be awarded, due process required that E.L. be "entitled to due notice and an opportunity to be heard on the matter." *Id.* at 61a. The court thus remanded for "an evidentiary hearing to decide the visitation issue." Pet. App. 61a.

E.L. successfully sought certiorari from the Alabama Supreme Court, which reversed. *Id.* at 5a. The supreme court acknowledged that, in determining whether an out-of-state judgment merits full faith and credit, the court's "review ... does not extend to a review of the legal merits of [that] judgment," but is instead "limit[ed] ... to whether the rendering court had jurisdiction to enter the judgment sought to be domesticated." *Id.* at 11a, 13a. Disagreeing with the court of appeals, however, the supreme court found that the defect in the adoption implicated the Georgia court's subject matter jurisdiction. After canvassing the

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[1] This opinion has been withdrawn and is unavailable on Westlaw. *See E.L. v. V.L.*, 2014 WL 5394513 (Ala. Civ. App. Oct. 24, 2014) (withdrawing opinion).

Georgia adoption statutes and jurisprudence, the court agreed with E.L. that Georgia law "makes no provision for a non-spouse to adopt a child without first terminating the parental rights of the current parents." *Id.* at 27a (citing *Wheeler v. Wheeler*, 642 S.E.2d 103, 104 (Ga. 2007) (Carley, J., dissenting from denial of certiorari); *Bates v. Bates*, 730 S.E.2d 482, 484 (Ga. Ct. App. 2012)). As the court explained, Georgia law makes termination of the current parent's rights a necessary "condition" before an adoption may be granted to a non-spouse. Pet. App. 30a (citing Ga. Code Ann. § 19-8-5(a)). Consequently, the undisputed failure of E.L. to surrender her parental rights resulted in a "void" adoption that the Georgia court "was not empowered to enter." Pet. App. 30a.

Because it resolved the case on those grounds, the Alabama Supreme Court did not reach E.L.'s alternative argument that the Georgia court lacked jurisdiction to award an adoption to V.L. because she never established a bona fide domicile in Georgia. *Id.* at 30a n.10; *see* Ga. Code Ann. § 19-8-3(a)(3) (to petition for adoption a person must, *inter alia*, have "been a bona fide resident of [Georgia] for at least six months immediately preceding the filing of the petition").

On November 16, 2015, V.L. timely petitioned this Court for a writ of certiorari. On December 14, 2015, this Court granted V.L.'s application to recall and stay the Alabama Supreme Court's certificate of judgment. Order in Nos. 15A522, 15A532 (U.S. Dec. 14, 2015).

REASONS FOR DENYING THE PETITION

I. V.L.'s petition is not certworthy.

A. There is no split of lower court authority on the question presented in this case.

V.L's petition does not even attempt to argue that the decision below implicates a split among lower courts, thus failing the most elementary test of certworthiness. *See, e.g., Braxton v. U.S.*, 500 U.S. 344, 347 (1991) (explaining a "principal purpose" of certiorari jurisdiction is "to resolve conflicts among the United States courts of appeals and state courts"). She claims only that the Alabama Supreme Court misapplied settled law. *See* Pet. 28 (asserting the decision is an "unprecedented application of the Full Faith and Credit Clause"). Even if she were right about that (and she is not, *see infra* II), the fact remains that error-correction is the weakest basis for granting certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law."); *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (noting "'error correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari'") (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013)) (brackets omitted).

While V.L.'s petition never accurately states it, the issue in this case is whether a state court owes full faith and credit to a sister-state adoption decree that was not merely erroneous but *void* under the sister-

state's adoption law. *See infra* II. As the Alabama Supreme Court found, the Georgia court purported to award an "adoption" to V.L. that, on its face, negated the fundamental condition for a Georgia adoption—it expressly refused to terminate the existing rights of the children's current parent. *See* Pet. App. 30a (noting that Georgia Code § 19-8-5(a) "defines the condition that must exist before such superior courts can grant adoptions to third parties such as V.L."). That defect, the court reasoned, went not to whether the Georgia court *should* have granted the adoption, but whether it had the *power* to grant such an adoption at all. Pet. App. 30a The court therefore concluded that the defect implicated the Georgia court's subject matter jurisdiction, thus depriving the adoption of full faith and credit under settled law. *Id.*

V.L. cites no case, state or federal, that reaches a different conclusion on a remotely comparable set of facts. She does not even try. Instead, V.L extravagantly claims that the Alabama Supreme Court's decision is a "gross deviation" from this Court's (and other courts') full faith and credit jurisprudence. Pet. 28. She is mistaken, *see infra* II, but the more salient point is that she avoids asserting that the Alabama decision *conflicts* with any decision from this Court or from any lower court, state or federal. There is good reason for that. The Alabama Supreme Court simply applied the settled principle that a judgment merits full faith and credit "only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). Every case V.L. cites, *see* Pet. 28-29, recognizes that venerable limitation on the Full Faith and Credit Clause. *See, e.g., Mack v. Mack*, 618 A.2d

744, 750 (Md. Ct. App. 1993) (because "[t]he mandate of [the Full Faith and Credit Clause] is not absolute, ... [i]t is proper for a forum court to examine the jurisdiction of the deciding court to determine whether the foreign judgment must be accorded full faith and credit") (citing, *inter alia*, *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)). In the decision below, the Alabama Supreme Court applied precisely that principle and found that the Georgia court lacked power to award the adoption at issue. *See* Pet. App. 24a (noting this Court's "distinction between a subject-matter jurisdiction challenge and a merits-based challenge" under the Full Faith and Credit Clause) (and discussing *Fauntleroy v. Lum*, 210 U.S. 230, 234-35 (1908)).

V.L. also mistakenly claims that the Alabama Supreme Court's decision is a "stark departure" from how other state courts have addressed the full faith and credit due sister-state adoptions. Pet. 30. To the contrary, the state decisions V.L. cites recognize exactly the same limitation on full faith and credit as the one applied by below.[2] And, again, V.L. avoids

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[2] *See, e.g.*, *In re Trust Created by Nixon*, 763 N.W.2d 404, 409 (Neb. 2009) (noting that while "the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, ... a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter"); *Giancaspro v. Congleton*, 2009 WL 416301, at *2 (Mich. Ct. App. Feb. 19, 2009) (observing that "[a] state need not give full faith and credit to a judgment issued by a court that lacked subject-matter jurisdiction over the litigation or jurisdiction over the parties"); *Hersey v. Hersey*, 171 N.E. 815, 819 (Mass. 1930) (explaining that, with respect to recognizing an out-of-state adoption, "[c]omplete inquiry is permissible into the circumstances of a judgment of a sister state

claiming that the lower court's decision conflicts with any of those cases. In fact, the closest case she cites, *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002), may *support* the Alabama Supreme Court's analysis. In *Russell*, the Nebraska Supreme Court suggested that a Pennsylvania court may have lacked jurisdiction to award a non-spousal adoption where the child's parent had retained her rights. *See id.* at 59-60 (considering whether, due to alleged lack of termination of parental rights, parent may "collaterally attack the judgment on the basis that the Pennsylvania court lacked subject matter jurisdiction").[3] Thus, far from showing that the Alabama Supreme Court's decision "starkly departs" from other state courts, V.L.'s cases show it is consistent with those courts' treatment of full faith and credit and adoptions.

Finally, V.L. persistently mischaracterizes the reasoning of the Alabama Supreme Court's decision, seeking to create the impression that it would deny full faith and credit to a wide array of sister-state adoptions. Principally, she claims the court "adopt[ed] a new understanding of 'jurisdiction,'" that would authorize collateral attacks on sister-state adoptions

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to determine whether it binds the person against whom it is invoked," and confirming that "[t]here may be searching investigation into the jurisdiction of the court in which the judgment is rendered, over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction") (quotations omitted).

[3] The court did not reach the issue, however, because no evidence showed the parent's failure to surrender her rights. *Id.* In the present case, of course, "it is undisputed that E.L. did not surrender her parental rights[.]" Pet App. 30a.

"*whenever* the issuing court allegedly failed to strictly comply with a statutory provision." Pet. 32, 31 (emphasis in original). That is false. In its decision, the Alabama Supreme Court merely referenced the common interpretive principle that adoption statutes, because they are in derogation of common law, should be strictly construed in favor of the rights of natural parents. Pet. App. 29a (citing *In re Marks*, 684 S.E.2d 364, 367 (Ga. 2009)); *see also, e.g., Matter of Adoption of Robert Paul P.*, 471 N.E.2d 424, 426 (N.Y. Ct. App. 1984) (explaining that, "because adoption is entirely statutory and is in derogation of common law, the legislative purposes and mandates must be strictly observed") (citations omitted). The court correctly applied this principle to determine whether Georgia law authorized an adoption in favor of a non-spouse without terminating the existing parent's rights. *See* Pet. App. 30a (interpreting Ga. Code Ann. § 19-8-5(a)). But the court never suggested that any and every flaw in an adoption qualifies as jurisdictional. To the contrary, after identifying the specific defect in this case, the court remarked that "[o]ur inquiry does not end here, however, as that error is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court." Pet. App. 28a.

B. V.L.'s overstated and speculative "harm" argument does not justify granting certiorari.

V.L. claims that the decision below will "harm Alabama families" by broadly negating adoptive rights granted in other states if there is *any* defect in the adoption, no matter how minor Pet. 32. More narrowly, she also predicts that the decision will harm

others in her situation because Georgia and other states grant adoptions that "allow[ ] an unmarried second parent to adopt without terminating the existing parent's rights." *Id.* Neither argument justifies granting certiorari in this case.

V.L.'s broader harm argument depends on her distortion of the decision below to mean that "*any* Georgia adoption that deviates from statutory requirements can be collaterally attacked in Alabama." Pet. 34 (emphasis in original). As already explained, that caricatures the Alabama Supreme Court's decision. *Supra* I.A. Far from holding that "any" defect opens a sister-state adoption to collateral attack, the lower court held only that a particular defect would do so—namely, when the decree defies the plain statutory requirement that the current parent relinquish her rights. Pet. App. 23a, 28a-30a. That defect, the court explained, did not result merely in an adoption that *should not* have been granted; it resulted in one that *could not* have been granted under Georgia law. *Id.* at 30a (concluding "the Georgia court was not empowered to enter the Georgia judgment declaring V.L. to be an adoptive parent of the children"). Contrary to V.L.'s argument, then, the Alabama Supreme Court's decision authorizes collateral attacks on adoptions only for a defect that implicates the issuing court's jurisdiction, which is a settled rule in full faith and credit jurisprudence.

V.L.'s more specific harm argument focuses on the wrong thing. How often "second parent" adoptions are granted to unmarried couples (in Georgia or elsewhere)

is not the relevant question for certiorari purposes.[4] Instead, the relevant question is whether the granting of such adoptions has led to lower court decisions exploring whether they merit full faith and credit in other states. Yet V.L. cites only one such decision, *Russell v. Bridgens*, which, as explained above, may support the Alabama Supreme Court's decision but ultimately did not resolve the issue. *See Russell*, 647 N.W.2d at 59-60. If this full faith and credit question arises in future cases, a division of authority may develop justifying certiorari. V.L.'s inability to cite any significant number of lower court decisions on this issue, much less a split of authority, shows that the moment has not arrived.

Moreover, the Court's usual practice of allowing an issue to percolate in lower courts has special force here. *See, e.g., California v. Carney*, 471 U.S. 386, 401 n.11 (1985) (Stevens, J., dissenting) (observing that "percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule'") (internal quotations and citation omitted). This Court has never considered whether an adoption merits the "exacting" level of full faith and credit that adversarial judgments do. *Baker*

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[4] Such adoptions are evidently granted in some states, but the reported appellate decisions diverge on whether they are authorized by state law. *Compare, e.g., Boseman v. Jarrell*, 704 N.E.2d 494, 501 (N.C. 2010) (concluding North Carolina courts lacked subject-matter jurisdiction to award a non-spousal adoption that failed to terminate the rights of the child's biological parent), *with In re Adoption of M.A.*, 930 A.2d 1088, 1098 (Me. 2007) (interpreting "ambiguous" Maine adoption statute to allow joint adoption by unmarried couple).

by Thomas v. General Motors Corp., 522 U.S. 222, 233 (1998). In *Hood v. McGehee*, 237 U.S. 611, 615 (1915), the Court decided only that full faith and credit did not prohibit Alabama from excluding out-of-state adoptees from its inheritance laws. Since *Hood*, decided a century ago, the Court has never again explored how full faith and credit applies to adoptions.

The nature of adoption decrees raises difficult issues under the Full Faith and Credit Clause. Most full faith and credit jurisprudence addresses judgments (typically money judgments) that are the product of adversarial proceedings and that can be readily enforced by another state regardless of the nature of the underlying claim. *See, e.g., Mills v. Duryee*, 11 U.S. (7 Cranch.) 481, 483-84 (1813) (addressing credit owed to a New York debt judgment in District of Columbia courts); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (discussing full faith and credit obligation requiring enforcement of sister-state judgments "for ... taxes, or for a gambling debt, or for damages for wrongful death"). By contrast, an adoption decree is typically the product of a non-adversarial proceeding; and, unlike a money judgment, it is largely a forward-looking decree, forging new relationships that seek integration into a new state's family laws. These characteristics of adoptions may present full faith and credit issues not encountered with other kinds of judgments. *See, e.g., New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616 (1947) (Frankfurter, J., concurring) (in full faith and credit context, "[c]onflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise"). For instance, they may implicate problems like those long

experienced by federal courts when adjudicating interstate recognition of child custody decrees. *See Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988) (describing difficulties in applying full faith and credit doctrine to child custody decrees, leading to enactment of federal Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A).

Furthermore, the specific kind of adoption at issue in this case—a "second parent" adoption—presents peculiar difficulties that counsel in favor of awaiting further percolation. V.L.'s petition asserts that trial courts "in numerous other states" have granted second parent adoptions to unmarried couples "without any appellate authority expressly affirming the validity of such adoptions." Pet. 36. A footnote adds that, while a "majority of states" grant these adoptions to unmarried couples, "only about ten states have expressly authorized such adoptions either by statute or case law." *Id.* n.10. What V.L. appears to concede here is that a significant share of the second parent adoptions granted to unmarried couples in the United States—including the one granted by the Georgia court in this case—are not authorized by state law. Yet she candidly asks this Court to grant her petition and force every state to recognize these unauthorized adoptions under the Full Faith and Credit Clause, despite the fact that, by her own admission, the laws of "only about ten states" permit them. *Id.* Given the uncertain legality of second parent adoptions—which V.L.'s own petition admits—the Court should await further percolation on the full faith and credit question before wading into this complex and uncertain area.

II. The Alabama Supreme Court correctly refused to accord full faith and credit to the Georgia decree.

Instead of identifying any split on the underlying question, V.L.'s petition argues only that the Alabama Supreme Court's decision was erroneous. She claims the decision: (1) examined the *merits* of the Georgia adoption, in violation the full faith and credit principle authorizing examination only of the court's *jurisdiction* (Pet. 13-15, 16-18); (2) failed to apply the presumption that the Georgia court, as a court with subject matter jurisdiction over adoptions, had jurisdiction to grant the adoption in this case (*id.* at 15, 18-20); and (3) ignored the rule that even jurisdictional collateral attacks are barred if the issuing court made its own "jurisdictional determination" (*id.* at 15-16, 24-26). V.L. is mistaken on all three grounds.

A. The Alabama Supreme Court correctly found that the defect in the Georgia adoption was jurisdictional.

Contrary to V.L.'s argument, the Alabama Supreme Court recognized and applied the settled rule denying full faith and credit to a sister-state judgment on the basis of the judgment's jurisdictional defects.[5] Drawing

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[5] *See* Pet. App. 11a ("emphasiz[ing]" that "our review does not extend to a review of the legal merits of the Georgia judgment ... because we are prohibited from making any inquiry into the merits ... by Art. IV. § 1, of the United States Constitution"); *id.* at 13a (observing "the question of a court's jurisdiction over the subject matter or parties is one of the few grounds upon which a judgment

on Justice Holmes' seminal discussion from *Fauntleroy v. Lum*, the Alabama court observed that the sometimes "difficult" distinction between jurisdiction and merits—or as Justice Holmes put it, the question of whether a statutory requirement is framed in terms of a court's "power" or "duty"—ultimately comes down to "a question of construction and common sense." Pet. App. 24a (quoting *Fauntleroy*, 210 U.S. at 234-25).

Applying that framework, the Alabama Supreme Court correctly determined that the Georgia court lacked power to award the kind of adoption at issue and that the defect in the adoption was therefore jurisdictional. The court concluded that the Georgia adoption statutes "*make no provision* for a non-spouse to adopt a child without first terminating the parental rights of the current parents." Pet. App. 27a (emphasis added). Thus, the decree purporting to grant parental rights to V.L., while expressly preserving the parental rights of E.L., was "void" because it contravened the basic "condition that must exist before [Georgia] courts can grant adoptions to third parties such as V.L."—namely the surrender of rights by all living parents of the children. *Id.* at 30a (citing Ga. Code Ann. § 19-8-5(a)). The court properly concluded that this flaw in the decree was jurisdictional because it went not merely to the Georgia's court's "duty," but rather to its "power" to grant the adoption at all. See Pet. App. 30a (concluding "the Georgia court *was not empowered* to enter the Georgia judgment declaring V.L. to be an adoptive parent of the children") (emphasis added). In

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may be challenged"); *id.* at 28a (any error in Georgia decree "is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court").

other words, instead of resulting in an adoption that *should not* have been entered by the Georgia court, the defect in this case resulted in an adoption that *could not* have been entered under Georgia law. That is a jurisdictional flaw for purposes of full faith and credit. *See id.* at 24a (a merits-based requirement only "define[s] the duty of the court," whereas a jurisdictional requirement "is meant to limit its power") (quoting *Fauntleroy*, 210 U.S. at 234-35).

V.L. completely fails to engage the Alabama Supreme Court's conclusion that the adoption in this case was void under Georgia law. Instead, she merely points out that the Georgia court in question had exclusive jurisdiction over adoptions and says that "should have been the end of the matter for purposes of the Full Faith and Credit Clause." Pet. 16-17 (citing Ga. Code Ann. § 19-8-2(a)). That begs the question. The fact that the court had jurisdiction over adoptions in general says nothing about whether the adoption granted here was within the authority conferred by Georgia law. As this Court has explained, a general statutory grant of jurisdiction does not foreclose re-examining jurisdiction in a particular case if jurisdiction is "disproved by extrinsic evidence, or by the record itself." *Adam v. Saenger*, 303 U.S. 59, 62 (1938). Here the record shows that the adoption granted to V.L. contravened a basic condition of an adoption under Georgia law. Pet. App. 30a. The fact that the court that granted this void adoption had exclusive jurisdiction over adoptions as a class of cases cannot create authority where there is none to begin with.

Notably, V.L. does not cite a single decision from a Georgia court standing for the proposition that the flaw in the Georgia decree goes only to the merits and not to jurisdiction. She dismisses statements from a Georgia Supreme Court Justice and the Georgia court of appeals strongly suggesting that the Alabama Supreme Court was right: Georgia courts lack the power to grant the kind of adoption granted in this case, which is therefore void. *See Wheeler*, 642 S.E.2d at 104 (Carley, J., dissenting from denial of certiorari) (stating that Georgia law "specifically proscribes" a second parent adoption in favor of a non-spouse and questioning whether courts have "'the power to grant such an adoption under the existing adoption statutes'") (quoting *In the Interest of Angel Lace M.*, 516 N.W.2d 678, 681 (Wis. 1994))[6]; *Bates*, 730 S.E.2d at 484 (noting in *dicta* that "[t]he idea that Georgia law permits a 'second parent' adoption is a doubtful one") (citing *Wheeler*, 642 S.E.2d at 103 (Carley, J., dissenting from denial of certiorari). And she fails to address decisions from other jurisdictions questioning the power of state courts to grant second-parent adoptions to persons not

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[6] V.L. argues that Justice Carley would have found that the defect goes to the merits and not to jurisdiction because he identified it as a "nonamendable defect" under Georgia Code § 9-11-60(d)(3), instead of § 9-11-60(d)(1) (addressing lack of jurisdiction over "the person or the subject matter"). Pet. 19-20. V.L. is mistaken. First, the section referenced by Justice Carley refers, not merely to a failure to state a claim, but rather to a defect that "affirmatively show[s] no claim in fact existed." Ga. Code Ann. § 9-11-60(d)(3). Second, Justice Carley's opinion emphasized that the defect in question was not a "technical flaw" in the adoption but rather an indication that the adoption was "unauthorized" and "specifically proscribe[d]" by Georgia law. *Wheeler*, 642 S.E.2d at 104-05 (Carley, J., dissenting from denial of certiorari).

married to the child's living parent. *See S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 823 & n.13 (Ky. App. Ct. 2008) (collecting cases); *see also Boseman*, 704 N.E.2d at 501 (holding North Carolina courts lacked subject-matter jurisdiction to grant such adoptions).

Instead of discussing any cases about state jurisdiction to award second-parent adoptions, V.L. relies on inapposite federal cases that find non-jurisdictional such requirements as the Title VII employee threshold (*Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006)), a territorial requirement in the securities fraud statute (*Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010)), and the requirement of finding undue hardship before discharging student loan debt in bankruptcy (*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)). Pet. 17 The statutory prerequisites in those cases, however, did not go to the "tribunal's power" but only to "whether the allegations the plaintiff makes entitle him to relief." *Morrison*, 561 U.S. at 247 (quotations omitted). By contrast, the surrender of parental rights goes to the *power* of Georgia courts to enter an adoption at all. As the lower court found, an adoption that fails to sever the current parent's rights is a legal impossibility under Georgia law and is therefore void.[7]

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[7] V.L. also relies on her erroneous claim that the Alabama Supreme Court held that *any* statutory error in an adoption proceeding would leave an adoption open to collateral attack in other states, thereby "creat[ing] a massive loophole in the Full Faith and Credit Clause." Pet. 22. As explained above, however, *supra* I.A, the Alabama Supreme Court limited its holding to jurisdictional defects and recognized that any error in a sister-

In sum, the Alabama Supreme Court correctly determined that the defect in the Georgia decree implicated, not (or not only) the *merits* of the adoption, but rather the court's *power* to award it in the first place. Thus, the lower court properly recognized that the Georgia adoption is not entitled to full faith and credit. *See, e.g., Williams*, 325 U.S. at 229 (explaining that, under the Full Faith and Credit Clause, "[a] judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment").

B. Any presumption of jurisdiction is defeated by the undisputed fact that E.L. did not surrender her rights.

Alternatively, V.L. argues that the Alabama Supreme Court was required to apply a "presumption" that the Georgia court had jurisdiction to award the adoption to V.L. because, as "a court of general jurisdiction," it has subject-matter jurisdiction over adoptions. Pet. 15. V.L. misunderstands the law. As she recognizes, this "presumption" of jurisdiction applies "unless disproved by extrinsic evidence, or by the record itself." *Id.* (quoting *Milliken*, 311 U.S. at 462). In this case, the Georgia court's lack of jurisdiction to award the adoption to V.L. is amply displayed by "the record itself": it was "undisputed" that E.L. did not surrender her parental rights. Pet. App. 30a. As the Alabama Supreme Court explained, E.L.'s failure to surrender her parental rights defeats

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state adoption "is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court." Pet. App. 28a.

the basic "condition that must exist" before a Georgia court can grant an adoption. *Id.* The undisputed record thus overcomes whatever presumption may operate in favor of the Georgia court's jurisdiction.

C. The Alabama Supreme Court's examination of jurisdiction is not foreclosed by *res judicata*.

Alternatively, V.L. argues that the Georgia court's jurisdiction is *res judicata* because the Georgia court made a "determination" that it had jurisdiction to award the adoption without terminating E.L.'s parental rights. Pet. 15, 24. V.L. is again mistaken.

The rule to which V.L. refers demands, as she concedes, that the issuing court have "made a jurisdictional determination that is itself entitled to *res judicata*." *Id.* at 15. This means that jurisdictional questions must "'have been fully and fairly litigated and finally decided in the court which rendered the original judgment' " *Underwriters Nat'l Assur. Co. v. N.C. Life & Acc. & Health Ins. Guar Ass'n*, 455 U.S. 691, 706 (1982) (quoting *Durfee v. Duke*, 375 U.S. 106, 111 (1963)). With respect to this case, then, the question is whether the Georgia court "fully and fairly litigated" its authority to grant an adoption to a non-spouse without terminating the parental rights of the current parents.

The answer is obviously no. Nothing in the adoption proceedings, or in the decree itself, suggests that the question of whether Georgia law authorizes the kind of adoption at issue was even considered, much less "fully and fairly litigated." Anticipating this problem, V.L. struggles to argue that the Georgia court "specifically

addressed" jurisdiction in its conclusion of law that declined to terminate E.L.'s parental rights. Pet. 24. But that legal conclusion did not address, nor even mention, the court's statutory authority to grant the adoption. Rather, it stated only that it would be "contrary to the children's best interests" not to recognize both women as their legal parents. *Id.*[8] Whether an adoption is in a child's best interests, however, is distinct from the prior question of the court's authority to grant the adoption in the first place. *See, e.g., Angel Lace M.*, 516 N.W.2d at 681 ("[T]he fact that an adoption—or any other action affecting a child—is in the child's best interests, by itself, does not authorize a court to grant the adoption."). Moreover, the Alabama Supreme Court did not question whether the adoption was in the children's best interests—which would indeed be a "merits" determination not re-examinable under full faith and credit. Rather, the Alabama court questioned whether the adoption was void because the Georgia court had no authority to enter it.[9]

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[8] V.L. also attempts to rely on the Georgia court's finding that she "complied with all relevant and applicable formalities" for the adoption petition. Pet. 24. But that boilerplate recitation does not even mention the court's authority to grant the adoption; *a fortiori*, it cannot amount to a "full and fair litigation" of jurisdiction for full faith and credit purposes.

[9] V.L. incorrectly claims that Georgia law forecloses a jurisdictional challenge to a court's determination of parental rights by a parent who participated in prior litigation. Pet. 25. The cases she cites, however, fail to support that assertion. *Amerison v. Vandiver*, 673 S.E.2d 850, 851 (Ga. 2009), holds only that under some circumstances laches may bar a parent's jurisdictional challenge to a termination of rights. To the extent *Marshall v. Marshall*, 360

In sum, the Georgia court did not address whether it had jurisdiction to grant the adoption in this case. Therefore, that court's jurisdiction was not *res judicata* and the Alabama Supreme Court could properly examine it.

D. Alternatively, the Georgia decree was not entitled to full faith and credit because V.L. never had a genuine domicile in Georgia.

The Alabama Supreme Court's decision could be upheld on the alternative ground that the undisputed record shows V.L. never established a bona fide Georgia domicile as required by Georgia adoption law. *See* Ga. Code Ann. § 19-8-3(a)(3) (to petition for adoption a person must have "been a bona fide resident of [Georgia] for at least six months immediately preceding the filing of the petition"); *see also, e.g., Sastre v. McDaniel*, 667 S.E.2d 896, 898 (Ga. App. 2008) (discussing residency requirement for adoptions). Although E.L. raised this issue, the Alabama Supreme Court resolved the full faith and credit issue on other grounds. *See* Pet. App. 30a n.10 (declining to consider E.L's alternative argument that "the Georgia judgment is also void because E.L. was not a bona fide resident of Georgia").

A party's failure to establish a domicile supporting a sister state judgment is a ground for denying full faith and credit to that judgment. *See, e.g., Williams*, 325 U.S. at 237 (North Carolina properly resisted full

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S.E.2d 572 (Ga. 1987), ever supported the proposition V.L. asserts, the decision is no longer good law. *See Scott v. Scott*, 644 S.E.2d 842, 844 (Ga. 2007) (overruling *Marshall*).

faith and credit to Nevada divorce where "the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina"); *Estin v. Estin*, 334 U.S. 541, 543 (1948) (explaining that "while the finding of domicile by the court that granted the [divorce] decree is entitled to prima facie weight, it is not conclusive in a sister State but might be relitigated there"); *Armstrong v. Armstrong*, 350 U.S. 568, 578 (1956) (allowing Ohio challenge to Florida divorce judgment on basis of lack of domicile).

Here, the record shows without contradiction that V.L. never established a bona fide domicile in Georgia. Instead, she and E.L. leased a Georgia home solely to provide a temporary setting for the "home study" required by the adoption process. *See supra* A. All the while, however, V.L. continued to live and work in Alabama and never intended to live in Georgia. Pet. App. 6a-7a; *see also, e.g., Sastre*, 667 S.E.2d at 673 ("bona fide resident" in Georgia adoption statutes means having "a single fixed place of abode with the intention of remaining there indefinitely") (quotations and citations omitted). Because "the evidence demonstrate[s] that [V.L.] went to [Georgia] solely for the purpose of obtaining [the adoption] and intended all along to return to [Alabama]," Alabama courts would have been justified in denying full faith and credit to the Georgia adoption. *Williams*, 325 U.S. at 237 (brackets added).

It is true that this Court has held, in the divorce context, that a party to the divorce cannot thereafter collaterally challenge the original court's "finding of jurisdictional facts ... made in proceedings in which the

[challenger] appeared and participated." *Sherrer v. Sherrer*, 334 U.S. 343, 349 (1948). That principle, however, would not preclude a court from denying full faith and credit to the adoption decree in this case on the basis of V.L.'s lack of domicile. The rule barring collateral attacks on jurisdictional facts is triggered only if the court issuing the original judgment actually *adjudicated* the jurisdictional question at issue. *See, e.g., Durfree*, 375 U.S. at 112 (where "the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties") (citing *Davis v. Davis*, 305 U.S. 32 (1938); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939)); *see also, e.g., Sherrer*, 334 U.S. at 356 (full faith and credit bars re-litigating "findings of jurisdictional fact made by a competent court"). In this case, nothing in the Georgia adoption proceedings or the decree itself suggests the issue of V.L.'s domicile was litigated at all. Furthermore, the Georgia decree makes no findings regarding V.L.'s domicile.

In sum, because V.L.'s Georgia domicile was not litigated in the Georgia proceedings, no full faith and credit principle would prevent Alabama courts from examining whether V.L. actually established a bona fide domicile sufficient to support the adoption. The record in this case provides only one possible answer to that question: V.L. "went to [Georgia] solely for the purpose of obtaining [the adoption] and intended all along to return to [Alabama]." *Williams*, 325 U.S. at 237 (brackets added). The Full Faith and Credit Clause does not require Alabama courts to recognize an adoption obtained by such jurisdictional gamesmanship.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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